Supreme Court, U.S.
FILED
JAN 27 1972
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-9604

OCTOBER TERM, 1971

LEWIS EDGAR MULLINS,

Petitioner

vs.

STATE OF OHIO

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above-entitled case on the 22nd day of September, 1971, dismissing Petitioner's appeal as of right and denying Petitioner's motion for a rehearing on the 3rd day of November, 1971.

JURISDICTION

The dismissal of Petitioner's appeal as of right and the denying of Petitioner's motion for a rehearing were both entered by the Supreme Court of Ohio, the highest State Court in which a decision could be had, on November 3, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether a search warrant issued to search the body of an individual can be extended to also search the same individual's automobile that is parked some distance from where the individual has been searched and nothing is found on his person other than a few hundred dollars ?

2. Whether Section 14, Article 1 of the Ohio Constitution and the Fourth Amendment of the Federal Constitution prohibits the searching of an individual's property without a valid search warrant and before the individual has been placed under arrest by proper authorities ?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Ohio Statutes regulating search warrants (O.R.C. 2933.24) regulating the contents of a search warrant and Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States are printed in the Appendix infra pp 10 , and the Ohio Constitution, Article 1, Section 14, infra pp 10 .

STATEMENT OF THE CASE

This is an appeal from a conviction of possession of "numbers game" ticket under the Ohio Revised Code Section 2915.111.

This charge grew out of a search of the Petitioner's automobile by members of the Columbus Police Department on July 15, 1970. Although the Petitioner contended in the trial Court that the search of the Petitioner's automobile was made without a valid search warrant and with timely objections being raised throughout the trial to suppress the evidence obtained as a result of this search, the trial Court permitted the introduction of this evidence into Court.

The issue is being presented to this Court as to whether the search warrant which was issued in searching Petitioner's automobile was valid

and whether the motions to suppress the evidence obtained by the officers from the pocket of a trench coat, laying on the back seat of Petitioner's automobile should have been sustained by the lower Court and further, whether the evidence admitted into evidence came under Section 2915.111 of the Ohio Revised Code.

Throughout the entire proceedings of this case, from the trial Court to the Ohio Supreme Court, the Petitioner contended and still contends that the evidence obtained by the police from his automobile parked some distance from where the Petitioner was searched, should have been suppressed inasmuch as the search warrant only ordered the person of the Petitioner to be searched and not his personal property. Further, the Petitioner was not placed under arrest until after the paper was found in the automobile.

REASONS FOR GRANTING THE WRIT

1. A person may not be convicted of a criminal offense on the basis of evidence obtained by illegal search and seizure in violation of Section 14, Article 1 of the Ohio Constitution and the Fourth Amendment of the Federal Constitution which prohibits unreasonable searches and seizures.

A. The search warrant was issued to search the Petitioner's person only and not his automobile which was parked some distance from where the Petitioner was standing and searched, nothing being found on his person.

The only evidence, a slip of paper that contained initials and amounts was obtained from the Petitioner's automobile in the pocket of an old raincoat laying on the back seat of the Petitioner's automobile. The Petitioner contends that the motion to suppress this evidence should have been granted because this evidence was illegally obtained.

Under both Ohio law and the United States Constitution, a search without a warrant demands exceptional circumstances. Johnson vs. United States, 269 U.S. 20, the Court sets out the following principle:

> "The right of privacy was deemed too precious to entrust to the direction of those whose job is the destruction of crime and the arrest of criminals. Power is a heady

> thing and history shows that the police acting on their own cannot be trusted. We cannot be true to that Constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the Constitutional mandate that the exigencies of the situation made the course imperative."

Officer Mauldin during the trial in the Franklin County Municipal Court testified on cross-examination that he observed the Petitioner, for the better part of an hour, during which period of time a search warrant could have been obtained by police officers to search the Petitioner's automobile.

An Ohio case, State vs. Call, 80 App. 277.37 O. Ops. 2nd 274, 220 N.E. 2nd 130, held that there were no exceptional circumstances so as to furnish excuse for the lack of a search warrant when defendant's car was searched and items found therein seized, where the search was not incidental to a lawful arrest and where there was no probable cause to believe that a crime had been committed and there was no consent.

In the case at bar, the purported number slip was taken by the police officers from the Petitioner's automobile after searching the person of the Petitioner and finding nothing. Petitioner was placed under arrest after his automobile had been searched.

It is Petitioner's contention that this act is clearly inviolation of his rights under the Fourth Amendment to the United States Constitution as set forth in Mapp vs. Ohio, 367 U.S. 643.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

3. This Court should grant certiorari in order to decide whether this alleged offense is in fact a violation of Section 2915.111 of the Ohio Revised Code, under which the Petitioner was charged. The Statute provides as follows:

> "No person shall own, possess, have on or about his person, have in his custody, or have under his control a ticket, order, or devise for representing a number of shares or an interest in a scheme of chance known as 'policy', 'numbers game','clearing house', or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this State."

Counsel for Petitioner is of the opinion that this Statute was specifically enacted to cover such number tickets and not mere slips of papers such as tapes, memoranda, or business entries.

Prior to the enactment of Section 2915.111 of the Ohio Revised Code, here was no penal statute against the mere possession of number slips s such. This was pointed out in State vs. Jerels, 32 O. Ap. 502.

This specific statute was enacted to "close the gap" and made he mere possession of number slips a criminal offense.

We know full well that a title or caption of a particular statute is ot absolute in determining the nature of the statute. However, an xamination of Section 2915.111 of the Ohio Revised Code shows the tle of that particular statute to be, "Possession of Number Tickets".

Counsel for the Petitioner contend that a business record or book f account kept by the "house" for use in its operations and to keep track f its dealings is not an order representing a number of shares or an interest" in the game.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari ould be granted.

Respectfully submitted,

L. R. CURTIS
DANIEL L. MANN
Counsel for Petitioner

nuary , 1972

APPENDIX

OPINIONS AND JUDGMENTS BELOW

ENTRY IN THE SUPREME COURT OF OHIO ON THE APPEAL FROM THE COURT OF APPEALS SEPTEMBER 22, 1971

This cause here on appeal as of right from the Court of Appeals for Franklin County was heard in the manner prescribed by law, and no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

ENTRY IN THE SUPREME COURT OF OHIO ON THE MOTION FOR REHEARING NOVEMBER 3, 1971

It is ordered by the Court that rehearing in this case is denied.

ENTRY IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO FILED MARCH 16, 1971

On consideration of the record and Assignments of Error in this appeal on questions of law, the Court finds that there was error appearing on the record in proceedings and judgment of the Court below, prejudicial

prejudicial to the rights of the ~~Appellant~~ in the judgment of the Court in Appellant's Sixth Assignment of Error, to wit: that the Court erred in failing to ask defendant if he had anything to say before sentence was passed, and for that reason the case is remanded to the trial Court for sentencing.

The Court finds further that there were no other errors appearing of record as to the First, Second, Third, Fourth, Fifth, and Seventh Assignments of Error and the judgment of the Franklin County Court is affirmed except as to the Sixth Assignment of Error as hereinabove mentioned. Exceptions saved.

Motion for reconsideration overruled.

ENTRY OF THE FRANKLIN COUNTY
MUNICIPAL COURT
DATED NOVEMBER 4, 1970

Coming down to the decision of the Court with respect to the charge as filed against the defendant, the Court does find beyond a reasonable doubt that the defendant is guilty as charged in the affidavit.

G. W. Fais, Judge

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

State of Ohio, :

Plaintiff-Appellee, :

v. : No. 9986

Lewis Edgar Mullins, :

Defendant-Appellant. :

D E C I S I O N

Rendered on March 16, 1971

MR. JOHN C. YOUNG, City Attorney,
MR. WILLIAM CROMLEY, Assistant,
City Hall,
Columbus, Ohio,
For Plaintiff-Appellee.

MR. DANIEL L. MANN, JR., and
MR. LAWRENCE R. CURTIS,
233 South High Street,
Columbus, Ohio,
For Defendant-Appellant.

HOLMES, J.

This is an appeal from a conviction in the Municipal Court of Franklin County of the offense of possession of numbers slips pursuant to R. C. 2915.11.

The defendant-appellant had been arrested after a search of his person and his automobile, at which time the arresting officer had found what purportedly was a numbers tally sheet in the defendant's topcoat pocket, which topcoat was found laying on the back seat of the defendant's automobile.

The appellant in essence cites the following as his assignments of error: that the court erred in refusing to hear defendant's motion to suppress the evidence; that the court erred in admitting the numbers tally sheet as evidence in that such were the fruits of an unreasonable search and seizure; the court erred in refusing to grant the defendant's motion to dismiss; the court erred in ruling that the papers obtained by the search constituted a "ticket, order or device representing a share or interest in a numbers game"; the court erred in failing to ask the defendant if he had anything to say before sentence was passed; and finally that the verdict was contrary to law and against the manifest weight of the evidence.

The trial court did not err in refusing to hear the defendant's motion to suppress in that such motion was not timely filed pursuant to the rules of the Municipal Court

of Franklin County. Such motion was not filed until after pre-trial which was contrary to the rule provided therefor, and the fact that a jury trial had been waived does not alter the rule.

The trial court did not err in admitting state's Exhibit #1, the numbers tally sheet. The appellant states that his automobile was illegally searched in that the warrant only specifies that the defendant's person was to be searched.

The warrant was issued by the judge of the Municipal Court on the basis of the affidavit of the arresting officer, which affidavit stated that the officer had good cause to believe that numbers slips were being kept on the person of the defendant and inside a 1961 Lincoln Continental, Ohio 1970 license #23589.

The officer's affidavit further elucidated the grounds upon which his belief were founded, i.e., reliable informants and his own personal knowledge of the activities of the defendant regarding numbers operations.

We hold that any search of the defendant, or of his automobile, may be sustained upon the basis of probable cause for such search. Here the search warrant sets forth

that such search was to be that of the defendant's person. We feel that for purposes of the search, the defendant's coat, even though thrown over the back seat, is in fact a part of his person. Within such view, the search warrant would specifically cover such a search.

However, if it be assumed that the defendant's coat is not a part of his person, the search of the defendant's automobile under the circumstances was a reasonable one in that it was based upon probable cause. Chambers v. Maroney (1970), 26 L. Ed. 2d 419.

The trial court did not err in refusing to grant the defendant's motion to dismiss after the state had rested, in that appropriate issues regarding the charge against the defendant had been presented in the state's case.

Also the trial court did not err in ruling that the state's Exhibit #1 constituted a "ticket, order or device representing a share or interest in a numbers game." This court has reviewed what constitutes such items in State v. Felice A. Baldassaro, Case No. 9661, decided February 3, 1970. The tally sheet as found within the defendant's possession by the arresting officer would qualify as being within the wording of the statute.

As to the defendant-appellant's sixth assignment of error, we must agree that the trial court erred in not asking the defendant before sentence whether he had anything to say to the court as to why judgment should not be pronounced against him.

The law applicable to such sentencing proceedings is R. C. 2947.05, as follows:

> "Before sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, or the finding of the court, and asked whether he has anything to say as to why judgment should not be pronounced against him."

A mandatory duty is imposed on a trial judge to ask an accused person whether he has anything to say why judgment should not be pronounced against him; if error is prosecuted and a court of review finds no error except failure in this duty, the judgment should be reversed for sentence. Silsby v. State (1928), 119 Ohio St. 314.

Here there is no disagreement that the trial court directed such a question to the defendant's counsel, and not to the defendant himself. This would not constitute compliance with the statute.

There being no other error found within the

proceeding, the judgment is reversed on this sole ground and the matter is remanded for resentencing.

TROOP, P. J., and WHITESIDE, J., concur.

CERTIFICATE OF SERVICE

We hereby certify that on this 20th day of January, 1972, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Mr. James Hughes, City Attorney, Thomas Erlenbach, Chief Prosecutor, City Hall, Columbus, Ohio. We further certify that all parties required to be served have been served.

L. R. Curtis

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